Abdul Rahman bin Ismail v Pembangunan Qualicare Sdn Bhd

HIGH COURT (PENANG) — COMPANIES WINDING-UP PETITION NO 28–6–01 OF 2013
LIM CHONG FONG J
20 JUNE 2018

Companies and Corporations — Winding up — Liquidators — Competing applications by petitioner and creditors to appoint private liquidator — Whether appointment of private liquidator fit and proper — Whether appointment of liquidator uphold interest of justice — Companies Act 2016 s 477

These were the competing applications to appoint a private liquidator in replacement of official receiver for a wound-up company. The respondent company was wound up by the petitioner who was its contributor and director on 4 April 2013. The official receiver was appointed as the provisional liquidator and the petitioner filed its proof of debt. The respondent was indebted to two creditors, China Idea Development Ltd and Yanfull Investment Ltd by virtue of the court's orders dated 3 April 2013 and 18 October 2012 respectively. The dissolution of the respondent was still ongoing to date. The creditor filed its notice of motion dated 5 October 2017 in encl 18 to apply to appoint Dato' Heng Ji Keng and Andrew Heng as joint and several liquidators of the respondent company. The petitioner then similarly filed its notice of motion to appoint Afrizan bin Hussein instead. Another creditor filed an affidavit to support the creditor's application and opposed the petitioner's application.

Held:

(1) The official receiver had no objection to the applications that it ceased to act as the provisional liquidator and was replaced by a private liquidator. This was a fit and proper for the appointment of a private liquidator in replacement of official receiver in view of the slow progress after five years in settling the dissolution of the respondent company due to the mammoth caseload handled by the official receiver (see paras 15–16).

(2) Subject to disqualifications because of conflict of interest, the appointment of liquidator was often based on the majority wishes. The classic maxim 'justice must not only be done but also seen to be done' must be applied to the appointment of liquidator who performed his duties as officer of the court. On the nominees proposed, it would not be fair for the court in the interest of justice to appoint any one of them without ascertaining the validity of the assertions and claims of the respective parties but that would require a mini trial. Hence and in order

to have the liquidator appointed expeditiously and to save costs, the court instead proposed that the court would nominate an independent nominee as liquidator. The parties had agreed and consented to one of the two nominees put to them. For the above reasons, Chua Man Kit of PKF Malaysia was appointed as the private liquidator (see paras 11 & 22–25).

[Bahasa Malaysia summary

Ini merupakan pertikaian permohon pelantikan likuidator persendirian sebagai pengganti kepada penerima rasmi sebuah syarikat yang digulungkan. Syarikat responden telah digulungkan oleh pempetisyen yang merupakan pengusaha dan pengarah pada 4 April 2013. Penerima rasmi syarikat telah dilantik oleh likuidator sementara dan pempetisyen telah memfailkan bukti kebankrapan. Responden mempunyai hutang kepada dua pemiutang iaitu China Idea Development Ltd dan Yanfull Investment Ltd melalui perintah mahkamah bertarikh 3 April 2013 dan 18 Oktober 2012. Penggulungan responden masih berjalan sehingga kini. Pemiutang telah memfailkan notis pemula bertarikh 5 Oktober 2017 dalam lampiran 18 to memohon pelantikan Dato' Heng Ji Keng dan Andrew Heng sebagai likuidator bersama dan berasingan untuk syarikat responden. Pempetisyen pula memfailkan notis pemula yang sama dengan memohon perlantikan Afrizan bin Hussein. Pemiutang yang lain memfailkan satu afidavit untuk menyokong permohonan pemiutang dan membantah permohonan pempetisyen.

Diputuskan:

(1) Penerima rasmi tidak mempunyai bantahan kepada permohonan-permohonan yang dibuat yang menyebabkan penerima rasmi berhenti menjadi likuidator sementara dan telah digantikan oleh likuidator persendirian. Ini merupakan cara lantikan likuidator persendirian yang teratur sebagai pengganti kepada penerima rasmi setelah melihat perkembangan yang perlahan mengenai penggulungan syarikat responden selepas lima tahun berhadapan dengan pelbagai kes yang diuruskan oleh pemerima rasmi (lihat perengaan 15–16)

(2) Tertakluk kepada halangan disebabkan konflik kepentingan, perlantikan likuidator biasanya dibuat berdasarkan penerimaan majoriti. Perumpamaan klasik yang mengatakan 'keadilan bukan sahaja perlu dibuat tetapi perlu dilihat untuk dibuat' mestilah digunapakai dalam melantik likuidator yang menjalankan tugas sebagai pegawai mahkamah. Berdasarkan percalonan yang dibuat, adalah tidak adil bagi mahkamah untuk melantik sesiapa daripada mereka tanpa meneliti kesahan tuntutan yang dibuat oleh pihak-pihak yang perlu didengar dalam satu perbicaraan yang kecil. Justeru, bagi melantik likuidator dalam tempoh yang segera dan bagi menjimatkan kos, mahkamah bercadang untuk melantik likuidator yang berasingan. Pihak-pihak telah bersetuju untuk

menerima lantikan salah seorang seperti mana yang dicadangkan oleh mahkamah. Atas sebab-sebab di atas, Chua Man Kit daripada PKF Malaysia telah dilantik sebagai likuidator persendirian (lihat perenggan 11 & 22–25).]

Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1645–1709.

Cases referred to

CH Construction and Trading v Langkah Cergas Sdn Bhd [1994] MLJU 579; [1994] 5 MLRH 225, HC (refd)

Code Brilliant Sdn Bhd & Ors v Heng Ji Keng & Ors [2014] 6 CLJ 502, HC (refd)

Fielding v Seery [2004] BCC 315, ChD (refd)

Malayan Banking Berhad v SKS Foam (M) Sdn Bhd [2017] MLJU 368, HC (refd)

Malaysian Assurance Alliance Bhd v Comsa Properties Sdn Bhd and another appeal [2011] MLJU 1554; [2011] 7 CLJ 942, CA (refd)

Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713; [2012] 2 CLJ 501, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 227
Companies Act 2016 s 477
Companies (Winding-up) Rules 1972 Second Schedule

Razlan Hadri bin Zulkifli (Mohamad Yazid bin Mohamad Salim with him) (Gan Ho Razlan Hadri) for the petitioner.
Teh Eng Lay (Cheah Teh & Su) for the creditor.
Kwan Will Sen (Skrine) for the further creditor.
Rohaifiza Md Radzi for the official receiver.

Lim Chong Fong J:

INTRODUCTION

[1] These are competing applications to appoint a private liquidator in replacement of the official receiver for a wound up company.

[2] The respondent company was wound up by the petitioner who is its contributor and director on 4 April 2013. The official receiver was appointed as the provisional liquidator and the petitioner filed his proof of debt.

A **[3]** Furthermore, the respondent was indebted to China Idea Development Ltd ('creditor') by virtue of an order made by this court dated 3 April 2013 pursuant to Originating Summons No 24-NCVC-461–03 of 2013 registering the foreign judgment in terms of the consent order dated 20 April 2009 made in the High Court of the Hong Kong Special Administrative Region Court. Accordingly, the creditor filed its proof of debt amounting to RM15,429,969.81 on 17 February 2015.

[4] Additionally, the respondent was also indebted to Yanfull Investment Ltd ('further creditor ') by virtue of an order made by the Kuala Lumpur High Court dated 18 October 2012 pursuant to Originating Summons No 24-NCVC-2429–09 of 2012 registering the foreign judgment in terms of the consent order dated 20 April 2009 made also in the High Court of the Hong Kong Special Administrative Region Court. Accordingly the further creditor also filed its proof of debt amounting to RM19,167,702.88 on 18 February 2004.

[5] The dissolution of the respondent has been still ongoing to date.

[6] Consequently, the creditor filed its notice of motion dated 5 October 2017 (encl 18) to apply to appoint Dato' Heng Ji Keng and Andrew Heng of Ferrier Hodgson MH Sdn Bhd as joint and several liquidators of the respondent company in replacement of the official receiver.

[7] As the result, the petitioner similarly filed its notice of motion dated 7 December 2017 (encl 23) to apply to appoint Afrizan bin Hussein of Parker Randall Insol Plt as the liquidator of the respondent company in replacement of the official receiver.

[8] The affidavits filed for the purposes of the creditor's application are as follows:

(a) creditor's affidavit in support affirmed by Ho Woon Choon dated 29 September 2017;

(b) petitioner's affidavit in reply affirmed by Abdul Rahman bin Ismail dated 7 December 2017; and

(c) creditor's affidavit in reply affirmed by Ho Woon Choon dated 22 January 2018.

[9] The affidavits that were filed for purposes of the petitioner's application are as follows:

(a) petitioner's affidavit in support affirmed by Abdul Rahman bin Ismail dated 7 December 2017;

(b) creditor's affidavit in reply affirmed by Ho Woon Choon dated 23 January 2018; and

(c) petitioner's affidavit in reply affirmed by Abdul Rahman bin Ismail dated 9 February 2018.

[10] The further creditor also filed an affidavit affirmed by Kwan Will Sen dated 30 May 2018 to support the creditor's application and oppose the petitioner's application.

[11] Both applications came before me for hearing on 4 and 18 June 2018. After hearing counsel, I ordered that Chua Man Kit of PKF Malaysia is appointed as the private liquidator and his remuneration is based on the Second Schedule of the Companies (Winding-up) Rules 1972 with joint indemnity by the parties. There shall no order as to costs in respect of both applications.

[12] I now provide below the supporting grounds of my decision.

CONTENTIONS AND FINDINGS

[13] The relevant law is contained in s 477 of the Companies Act 2016 which is pari materia with s 227 of the Companies Act 1965 that stipulates as follows:

> 227 Appointment, style, etc., of liquidators
>
> The following provisions with respect to liquidators shall have effect on a winding up order being made:
>
> (1) if an approved liquidator other than the official receiver is not appointed to be the liquidator of the company the official receiver shall by virtue of his office become the provisional liquidator and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such;
>
> (2) if there is no liquidator appointed the official receiver shall summon separate meetings of the creditor s and contributories of the company for the purpose of determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the official receiver;
>
> (3) the Court may make any appointment and order required to give effect to any such determination, and, if there is a difference between the determinations of the meetings of the creditor s and contributories in respect of the matter aforesaid, the Court shall decide the difference and make such order thereon as the Court may think fit;
>
> (4) in a case where a liquidator is not appointed by the Court, the official receiver shall be the liquidator of the company;

A (5) the official receiver shall by virtue of his office be the liquidator during any vacancy;

(6) any vacancy in the office of a liquidator appointed by the Court may be filled by the Court;

B (7) a liquidator shall be described, where a person other than the official receiver is liquidator, by the style of 'the liquidator', and, where the official receiver is liquidator, by the style of 'the official receiver and liquidator', of the particular company in respect of which he is appointed, and not by his individual name.

C

[14] In *CH Construction and Trading v Langkah Cergas Sdn Bhd* [1994] MLJU 579; [1994] 5 MLRH 225, Zakaria Yatim J (later FCJ) held as follows:

This is an application (encl 57) by summons in chambers in which Messrs CH Construction and Trading, the petitioner, is seeking the order of the court in terms D of the following prayers:

(a) that an approved liquidator pursuant to s 8 of the Companies Act 1965 namely, Mr Ng Pyak Yeow be substituted in place of the official receiver as liquidator of the respondent until further order;

E (b) that the liquidator upon giving security to the satisfaction of the official receiver and upon such appointment be at liberty to exercise all the functions and powers under the provisions of the Companies Act 1965;

(c) that the cost of the application be taxed and paid out of the assets of the F respondent; and

(d) such further or other relief as this honourable court may deem fit and just to grant.

...

G The court is fully aware that the official receiver is inundated with work and therefore understands why he could not take immediate steps in the present case. The official receiver in fact by a letter dated 5 July 1994 had consented to the appointment of another person to act as liquidator in his place. It is to be noted that Mr Ng Pyak Yeow is an accountant practicing in Messrs Ng, Lee & Partners.

H In my opinion this is a proper case for the court to make an order sought by the petitioner. In the circumstances I allow the application in terms of prayers (a), (b) and (c).

[15] At the outset, the official receiver here has no objection to the I applications that it ceases to act as the provisional liquidator and be replaced by a private liquidator. The official receiver is however neutral on the choice of the private liquidator.

[16] In view of the slow progress after five years in settling the dissolution of

the respondent company understandably because of the mammoth caseload handled by the official receiver, I am satisfied that this is a fit and proper case for the court's appointment of a private liquidator in replacement of the official receiver.

[17] That notwithstanding, the creditor and the petitioner were however at odds over the choice of the private liquidator.

[18] According to the creditor, the nominee proposed by the petitioner is unsuitable because Mr Afrizan bin Hussein of Parker Randall Insol Plt would be put in a position of conflict of interest because Parker Randall Loh was appointed by the respondent as its auditors from 14 March 2008 to 27 June 2009 and the petitioner has not been forthcoming to deny or explain any relationship between Parker Randall Insol Plt and Parker Randall Loh. Moreover the proposed liquidation fee charges were uncapped and subject to further discussion with the petitioner. The discussion is seemingly not transparent. That aside, the creditor point out that Mr Afrizan bin Hussein's performance as liquidator was questioned in *Malayan Banking Berhad v SKS Foam (M) Sdn Bhd* [2017] MLJU 368.

[19] On the other hand, the petitioner submitted that the nominees proposed by the creditor and supported by the further creditor are equally unsuitable because Dato' Heng Ji Keng's performance as liquidator had similarly been questioned in *Code Brilliant Sdn Bhd & Ors v Heng Ji Keng & Ors* [2014] 6 CLJ 502. In addition, the petitioner is suspicious and fearful that the creditor's nominated liquidator may further venture to fish for evidence in the respondent company for the creditor in its law suit against the petitioner and the rest of the respondent company's directors for fraudulent trading in KL High Court Suit No 22-NCVC-197–04 of 2015.

[20] The duty of the liquidator particularly in respect of conflict of interest has been explained by Zulkefli Makinudin CJ (Malaya) (now PCA) in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713; [2012] 2 CLJ 501 as follows:

> [25] It is trite that the correct principle with respect to conflict of interest in the case of liquidators are as set out in McPherson's Law of Company Liquidation (at paragraph 8.120). The guiding principle is that the liquidator must be independent and be seen to be independent. In other words, there cannot be an actual or apparent conflict.
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> ...
>
> [27] *On apparent conflict the correct approach is as set out in Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd* (1994) 14 ACSR 230 at p 233*:*
>
> In performing his functions the liquidator must both be and appear to be

A independent and impartial of the creditors; *Re Intercontinental Properties Ptv Ltd (in liq)* H 97712 ACLR 488 at 491-2

[After citing from *Re Chevron Furnishers Pry Ltd* the court held:]

... If the foregoing statement were taken as precluding any association, it being in
B the circumstances obiter, then even the most Ltd prior involvement with the company in liquidation could disqualify the relevant firm of accountants from providing one of its partners as liquidator. In my judgment, the correct balance is struck by permitting a liquidator to act as such even if there be a prior involvement with the company in liquidation, provided that involvement is not likely to impede
C or inhibit the liquidator from acting impartially in the interests of all creditor s or be such as would give rise to a reasonable apprehension on the part of a creditor that the liquidator might be so impeded or inhibited. In short the question should be whether there would be a reasonable apprehension by any creditor of lack of impartiality on the liquidator's part in the circumstances by reason of prior
D association with the company or those associated with it, including creditors, or indeed any other circumstance.

[21] In the English High court case of *Fielding v Seery* [2004] BCC 315, Maddocks J held as follows:

E (2) An application in relation to the appointment of the liquidator accordingly has to be considered by reference to the test adopted by Sir Andrew Monritt VC, and he proceeds at para 47 to set out the test being whether in his words. 'it will be conducive to both the proper operation of the process of liquidation, and to justice as between all those interested in the liquidation.'

F (3) It follows I think from this and from the statutory provisions and the rules to which I have referred, that although the majority vote of the normal course prevail, creditors holding the majority vote do not have the absolute right as to the choice of the liquidator. Thus the court may in a proper case restrain the holding of a meeting to remove a liquidator; see *Re Mansel, ex parte Sayer (18887)* LR 19 QBD 679, and
G as applied to a company increditor's liquidation the case of *Re Barrings (No 6)* to which I have referred.

(4) A liquidator should not be a person nor be the choice of a person who has a duty or purpose which conflicts with the duties of the liquidator. There are many illustrations of this principle. I was referred in particular to *Re City & County*
H *Investment Co* (1877) 25 WR 342, *Re Charterland Goldfields* (1909) 26 TLR 132, and *Re Corbenstone (No 2)* (1989) 5 BCC 767.

(5) More specifically the liquidator should not be the nominee of a person: (a) against whom the company has hostile or conflicting claims as in *Re City & County Investment Co*, (and see also *Deloitte & Touche AG v Johnson* [1999] BCC
I 992; [1999] 1 WLR 1605); or (b) whose conduct in relation to the affairs of the company is under investigation as in *Re Charterland Goldfield* (and *Re Mansel, ex parte Sayer*).

[22] Consequently but subject to disqualification because of conflict of

interest, the appointment of liquidator is often based on majority wishes: see *Malaysian Assurance Alliance Bhd v Comsa Properties Sdn Bhd and another appeal* [2011] MLJU 1554; [2011] 7 CLJ 942. I hold that the classic maxim 'justice must not only be done but also seen to be done' must apply also to the appointment of a liquidator who performs his duties as an officer of the court.

[23] On the nominees proposed, it would not be fair for me in the interest of justice to appoint any one of them without ascertaining the validity of the assertions and claims of the respective parties. It however necessitates a mini trial if that is to be done. Hence and in order to have the liquidator appointed expeditiously and save costs too, I instead proposed to the parties that the court makes the nomination of an independent nominee as the liquidator for their joint consent.

[24] As the result, the parties agreed to my proposal and consented to one of the two nominees put to them.

CONCLUSION

[25] It is for the foregoing reasons that I made the appointment of the liquidator as so ordered.

Order accordingly.

Reported by Mohd Kamarul Anwar